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IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are First Amendment scholars, each of whom has published a book or law review article on the subject. *Amici* law professors teach or have taught courses in constitutional law or the First Amendment and have devoted significant attention to studying the First Amendment. A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

Charlie Craig and David Mullins entered Masterpiece Cakeshop, Ltd., a retail business in Lakewood, Colorado, that sells wedding cakes and other baked goods to the general public, seeking to buy a wedding cake. But before they could even discuss what their cake would look like, the owner of Masterpiece Cakeshop told them that he would not sell them one. According to the owner, he "does not create wedding cakes for same-sex weddings." Pet. App. 65a. As the court below held, this discriminatory conduct violated Colorado's Anti-Discrimination Act, which makes it "unlawful for a person . . . to refuse . . . to an individual or group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation," Colo. Rev. Stat. § 24-34-601(2)(a).

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Insisting that Colorado's antidiscrimination law must give way, petitioners offer a sweeping view of the First Amendment, claiming that the cakes they bake are a form of art entitled to special protection, and that Colorado's antidiscrimination law compels their speech in violation of the First Amendment. For that reason, they insist that the Constitution exempts them and other businesses like them from having to comply with neutral and generally applicable state antidiscrimination laws. Petitioners are wrong. Accepting their arguments would wreak havoc with established First Amendment principles. Their claim both "exaggerates the significance of the expressive component" of the cakes they bake and "denigrates the importance of the rule of law [they] violated." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990).

The First Amendment, of course, "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), but laws like Colorado's that forbid discrimination by commercial entities do not compel speech. Heeding Colorado's Anti-Discrimination Act does not compel petitioners to speak, to deliver a state-sponsored message, or to conform to an official orthodoxy. "There is nothing in this case approaching a Government-mandated pledge or motto that the [business] must endorse." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 62 (2006) ("*FAIR*"). Colorado simply insists that business owners treat same-sex couples on the basis of "equal dignity," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), prohibiting discrimination against gay men and lesbians that "serves to disrespect and subordinate them," *id.* at 2604. The First Amendment does not give—and has never been understood to give—commercial businesses the right

to violate public accommodations laws that prohibit discrimination.

Public accommodations laws "affect what [commercial businesses] must *do* . . . not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Such laws regulate the market, not the marketplace of ideas. "The compelled speech to which [Masterpiece] point[s] is plainly incidental to the . . . regulation of conduct, and 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Rather, this Court's cases have consistently upheld the government's broad power to enact generally-applicable, content-neutral rules, even when such restrictions may have an incidental impact on expression. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). On the basis of these principles, this Court has repeatedly rejected First Amendment challenges to prohibitions on discrimination contained in federal, state, and local public accommodations laws. *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). Even *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), on which Masterpiece relies, recognizes that public accommodations laws "do not, as a general matter, violate the

First or Fourteenth Amendments." *Id.* at 572. Discriminatory refusals to serve cannot be treated as expressive conduct shielded from regulation by the First Amendment; otherwise, this Court's public accommodations cases would have come out the other way.

The fact that baking cakes for sale to the public—like other commercial endeavors—may have some creative and artistic aspects does not change the general rule or give Masterpiece Cakeshop and other commercial businesses like it "special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities," *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). The press is not entitled to special privileges other businesses lack by virtue of the First Amendment, *see Citizens United v. FEC*, 558 U.S. 310, 352 (2010); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983); neither are commercial bakers and other businesses that sell their services to individuals planning their wedding day. Baking a cake may have artistic aspects—much like dancing, making music, or designing furniture or clothing—but that does not mean a commercial baker is free to violate content-neutral rules regulating his business. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (music); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (same).

Petitioners hang their hat on two cases in which this Court held that public accommodations laws could not be constitutionally applied to noncommercial entities—a parade in one instance, *see Hurley*, 515 U.S. at 572, and a private membership organization in the other, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). The Court reasoned that, in each case, "forced

inclusion . . . would significantly affect [the group's] expression," *id.* at 656, because "the complaining speaker's own message was affected by the speech it was forced to accommodate," *FAIR*, 547 U.S. at 63. Masterpiece cannot make a similar showing. Colorado's statutory requirement that a public business must serve all customers without regard to race, gender, creed, or, as in this case, sexual orientation, "does not sufficiently interfere with any message of the [business]," *id.* at 64. Masterpiece's argument would rip *Hurley* and *Dale* from their moorings, inventing a new, sweeping exemption from neutral antidiscrimination laws for commercial businesses.

Petitioners' theory—which has no logical stopping point—would not only distort established First Amendment principles, it would also open the door to a host of new claims for constitutional exemptions. Were petitioners to prevail on their claim that they are entitled to an exemption from Colorado's Anti-Discrimination Act on the basis that the goods they sell have an "expressive component," countless other businesses will argue that they too are entitled to exemptions, resulting in a "gaping hole in the fabric of those laws," *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 431-32. Furthermore, if petitioners were to prevail here, the same arguments could be made by wedding vendors and other service providers who wish to refuse to serve interracial couples, or couples of a particular religious faith, such as Christian couples. If merely serving an individual implies an expression of views about the individual's core traits like race, religion, or sexual orientation, any vendor could refuse to serve any member of the public on that basis and cloak such discrimination as freedom of expression.

In short, a straightforward application of petitioners' theory would inevitably corrode public accommodations laws, which have for centuries ensured that businesses do not turn away their customers for discriminatory reasons. The First Amendment does not require that result.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROHIBIT STATES FROM REGULATING CONDUCT IN A CONTENT-NEUTRAL MANNER, EVEN THOUGH SUCH REGULATION MAY HAVE AN INCIDENTAL EFFECT ON SPEECH.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (alteration in original)); *accord Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). And just as the government may not restrict expression on the basis of content, it also may not compel speech based on content. *FAIR*, 547 U.S. at 61 ("[F]reedom of speech prohibits the government from telling people what they must say."). Thus, this Court has held that the First Amendment prohibits the government from compelling drivers to use their cars "as a 'mobile billboard' for the State's ideological message," *Wooley*, 430 U.S. at 715, compelling "a newspaper to print that which it would not otherwise print," *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), compelling students to salute the flag, *W. Va. State Bd. of Edu. v. Barnette*, 319 U.S. 624, 642 (1943), or compelling recipients of federal aid "to pledge alle-

giance to the Government's policy of eradicating prostitution," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 133 S. Ct. 2321, 2332 (2013). In these cases, the Court held that the First Amendment limited the power of government to require an individual to "personally speak the government's message" or "to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63.

The First Amendment does not apply with the same force when the government enacts generally applicable, content-neutral rules that regulate conduct, not speech. "Virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring) (emphasis in original). This Court has consistently refused to apply strict scrutiny when a plaintiff demands an exemption from a generally-applicable, content-neutral law regulating conduct. "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *FAIR*, 547 U.S. at 62 (quoting *Giboney*, 336 U.S. at 502); *see Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). Indeed, "the distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996).

This Court's cases have repeatedly held that "'an incidental burden on speech . . . is permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). This is true whether a plaintiff challenges a regulation for compelling speech or restricting it, *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (discussing the "constitutional equivalence of compelled speech and compelled silence"), and whether it affects certain kinds of speech more than others. "A facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

Thus, the fact that a content-neutral regulation may incidentally compel or limit expressive activities is no reason for exempting the speaker. Subjecting any incidental burden on speech to rigorous First Amendment review would open the floodgates to a host of claims for exemptions, inviting courts to second-guess a legislature's decision to prohibit certain forms of conduct. *See* Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm. & Mary L. Rev. 779, 784 (1985) ("To be concerned significantly . . . with incidental effects is to be committed to judicial scrutiny of an enormous range of government decisions. . . . More than in many other areas, the stopping point problem here is very real."). This Court has repeatedly declined this invitation. *See, e.g.*, *Arcara*, 478 U.S. at 705 ("[N]either the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities."); *Superior Court*

Trial Lawyers Ass'n, 493 U.S. at 431 ("Every concerted refusal to do business with a potential customer or supplier has an expressive component . . . . The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude."); *FAIR*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."). In short, an individual is not exempt from generally applicable, content-neutral laws merely because he seeks to express a message by violating them.

Under these principles, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567. Thus, this Court has recognized that "Congress . . . can prohibit employers from discriminating in hiring on the basis of race," and thereby "require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62. The words on the sign may be speech, but that fact "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct," *id.* Likewise, a newspaper can be prohibited from publishing "help wanted" advertisements offering employment opportunities restricted to persons of one sex. "Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press v. Human Relations Comm'n*, 413 U.S. 376, 389 (1973). "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express [an] idea or philosophy." *R.A.V.*, 505 U.S. at 390; *see* Resp'ts Br. 15-23 (Craig & Mullins); Resp't Br. 20-26 (CCRC).

There is no exception to these principles for expressive businesses. Libraries, schools, theaters, and bookstores can all be required to obey nondiscrimination rules. Such places, despite their expressive mission, are not entitled to an exemption from content-neutral laws that require serving customers without discriminating against them. Bakeries are no different.

Consistent with the principle that content-neutral regulations of conduct do not run afoul of the First Amendment, this Court held in *FAIR* that Congress could require law schools to grant equal access to military recruiters without violating the First Amendment because the law "regulates conduct, not speech." 547 U.S. at 60; *id.* (the statute "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*"). The law schools had argued that the law compelled them "to disseminate or accommodate a military recruiter's message," *id.* at 53, and that being forced to "treat military and nonmilitary recruiters alike" would compel their speech by "sending the message that they see nothing wrong with the military's policies, when they do," *id.* at 64-65.

This Court rejected those arguments, explaining that the law "neither limits what law schools may say nor requires them to say anything," and that "[l]aw schools remain free under the statute to express whatever views they may have on the military's . . . employment policy." *Id.* at 60; *id.* at 65 ("[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the [law] restricts what the law schools may say about the military's policies"); *see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-87 (1980) (rejecting the argument that a private property owner "has a First Amendment right

not to be forced by the State to use his property as a forum for the speech of others," because the shopping center was a "business establishment that is open to the public," and "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner"). Laws schools' missions—expressive at their core—are dedicated to fostering the "'marketplace of ideas,'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), in which "vibrant dialogue" ensures that "a view's validity should be tested through free and open discussion," *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 705, 706 (2010) (Kennedy, J., concurring). This does not translate into a right to be free from content-neutral regulations.

In *FAIR*, this Court also rejected the law schools' argument that "the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection," *id.* at 65, dismissing the view that "'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,'" *id.* at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66. In *FAIR*, the Court agreed that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters," but concluded that "these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* "The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants [heightened First Amendment] protection." *Id.* So too here. Turning

down a same-sex couple is expressive only because of what the business owner says about it.

Because, in line with *FAIR*, it is well-established that the First Amendment poses no bar to content-neutral regulations of conduct, courts have long upheld against First Amendment challenge public accommodations laws that regulate the conduct of commercial businesses. Colorado's Anti-Discrimination Act is such a law, and Masterpiece Cakeshop has no right to claim a special exemption from it. The next section examines this case law.

II. MASTERPIECE'S ARGUMENT IS INCONSISTENT WITH THIS COURT'S CASE LAW UPHOLDING THE CONSTITUTIONALITY OF PUBLIC ACCOMMODATIONS LAWS FORBIDDING DISCRIMINATION.

A. Public Accommodations Laws Have Been Repeatedly Upheld Against First Amendment Challenge.

It has been "customary in England from time immemorial, and in this country from its first colonization," for the government "to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, [and] innkeepers." *Munn v. Illinois*, 94 U.S. 113, 125 (1876). Public accommodations laws, which have existed for centuries, require "one that has made profession of a public employment," like innkeepers or blacksmiths, to be "bound to the utmost extent of that employment to serve the public." *Lane v. Cotton*, (1701) 88 Eng. Rep. 1458 (K.B.). Beginning in 1865, states began to codify prohibitions on discrimination by places of public accommodation, and by 1885, more than a dozen states had passed such nondiscrimination laws. *See* Milton R. Konvitz, *A Century of Civil Rights* 157

(1961); *see generally* Amicus Br. of Pub. Accommodations Scholars.

Those opposed to public accommodations laws have long argued that such laws violate the First Amendment. This Court has never accepted that argument. On the contrary, this Court has repeatedly upheld civil rights laws forbidding discriminatory conduct against First Amendment challenge. This Court's precedents establish that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572.

In *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 943-44 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968), a restaurant owner claimed that it would violate his conscience and his faith to serve African Americans in his restaurant. This Court called the owner's claim that he could not be required to serve African Americans "patently frivolous." 390 U.S. at 402 n.5. Likewise, in *Runyon v. McCrary*, this Court held that a federal law prohibiting racial discrimination in the making of contracts could be constitutionally applied to bar private schools from choosing students on the basis of race. 427 U.S. 160, 176-77 (1976). As the Court noted, "the Constitution . . . places no value on discrimination," *id.* at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)), and it assures Congress' authority to guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man," *id.* at 179 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968)); *id.* at 176 ("It may be assumed that parents have a

First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."). Much of what happens at private schools involves expression protected by the First Amendment, but that does not give such schools a license to discriminate.

This Court has also upheld state public accommodations laws that prohibit gender discrimination, rejecting arguments made by private clubs that they had a First Amendment right to keep out women. In *Roberts v. U.S. Jaycees*, this Court held that a Minnesota law prohibiting places of public accommodation from discriminating on the basis of gender did not violate a private organization's First Amendment right to expressive association. 468 U.S. at 612, 615. The Court emphasized that the law was a content-neutral regulation of conduct. As the Court explained, the law "does not aim at the suppression of speech" or distinguish action "on the basis of viewpoint," but rather "eliminat[es] discrimination and assur[es] . . . citizens equal access to publicly available goods and services." *Id.* at 623-24. "That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id.* at 624. Moreover, "even if enforcement of the Act causes *some incidental abridgement* of [the organization's] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628 (emphasis added). As the Court reasoned, "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [an organization] may

have on the male members' associational freedoms." *Id.* at 623.

Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, this Court held that the California Civil Rights Act's requirement that Rotary Clubs accept women did not violate the clubs' First Amendment rights to expressive association. 481 U.S. at 548-49. Even if the statute "work[s] *some slight infringement* on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.* at 549 (emphasis added); *see N.Y. State Club Ass'n*, 487 U.S. at 12 (upholding local ban on discrimination by private clubs because, although "a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation," "that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so").

Further, this Court has upheld Title VII's ban on sex discrimination in employment, rejecting a law firm's First Amendment challenge. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII's prohibition on sex-based discrimination in hiring did not "infringe" a law firm's "constitutional rights of expression or association"). The work of law firms and other legal organizations often involves core First Amendment speech, *see Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963), but that does not mean lawyers can discriminate in hiring.

This Court has also upheld against First Amendment challenge legal rules that ensure equal treatment regardless of sexual orientation. In *Christian*

Legal Society v. Martinez, this Court rejected a First Amendment challenge to a law school's policy requiring officially-recognized student groups to accept all students, refusing to provide a "preferential exemption" to a student group that sought to discriminate based on sexual orientation and religion, 561 U.S. at 669. The Court held that the university's all-comers policy was content-neutral and "help[ed] . . . to police the written terms of [the school's] Nondiscrimination Policy." *Id.* at 688; *id.* at 689 (rejecting argument that CLS "does not exclude individuals because of sexual orientation" because "[o]ur decisions have declined to distinguish between status and conduct in this context"); *id.* at 701 (Stevens, J., concurring) (recognizing that university rules can "safeguard students from invidious forms of discrimination, including sexual orientation discrimination").

It did not matter in *Christian Legal Society* that the university's policy might have a disproportionate effect on certain student groups. "'[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id.* at 695 (quoting *Ward*, 491 U.S. at 791). Thus, "[e]ven if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, '[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.'" *Id.* at 696 (quoting *R.A.V.*, 505 U.S. at 390). Because the law school's policy "aims at the *act* of rejecting would-be group members," its policy is "reasonable and viewpoint neutral" and therefore constitutional. *Id.* at 696-97; *id.* at 703-04 (Kennedy, J., concurring) ("[T]he school policy in question is not content based either in its formulation or evident purpose;

and were it shown to be otherwise, the case likely should have a different outcome.").

In the face of this Court's repeated rejection of First Amendment challenges to laws prohibiting discrimination by places of public accommodation and other commercial establishments, petitioners can point to only two cases in which public accommodations laws have been found constitutionally infirm. But petitioners dramatically overread these precedents, ignoring the reasons why this Court upheld those challenges. Indeed, even under the broadest reading of those cases, a commercial business cannot claim a constitutional exemption from state prohibitions on discrimination, including on the basis of sexual orientation.

In *Hurley*, this Court held that a public accommodations law could not be applied to require a parade organizer to include in its parade a group with which it disagreed. The Court accepted that public accommodations laws that prohibit "discriminating against individuals in the provision of publicly available goods, privileges, and services" "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. But the Massachusetts law in question was "applied in a peculiar way," in effect requiring organizers of a parade "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 572, 578. Thus, contrasting a typical public accommodations provision—which would ensure that "gays and lesbians . . . will not be turned away merely on the proprietor's exercise of personal preference," *id.*—this Court held that the Massachusetts law, as applied, forced the parade organizers to alter the parade's message for no legitimate reason, *id.* (finding that no "le-

gitimate interest [has] been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade").

In *Dale*, this Court held that applying New Jersey's public accommodations law to require the Boy Scouts to accept a gay man as a scoutmaster violated the organization's First Amendment rights. 530 U.S. at 644. As in *Hurley*, the linchpin of the Court's analysis was that "forced inclusion of Dale would significantly affect [the Boy Scouts'] expression," *id.* at 656, by "interfer[ing] with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," *id.* at 654; *see Christian Legal Soc'y*, 561 U.S. at 680 ("Insisting that an organization embrace unwelcome members . . . 'directly and immediately affects associational rights.'" (quoting *Dale*, 530 U.S. at 659)).

As in *Hurley*, the First Amendment issue was a product of the fact that the New Jersey public accommodations law, as interpreted by the state courts, was "extremely broad." *Dale*, 530 U.S. at 657. The law prohibited discrimination by some places "one would expect to be places where the public is invited": "taverns, restaurants, retail shops, and public libraries." *Id.* But the statute was interpreted to "include[] places that often may not carry with them open invitations to the public, like summer camps and roof gardens," and could be applied "to a private entity without even attempting to tie the term 'place' to physical location." *Id.* This Court explained that the "potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased" as "the definition of 'public accommodation' has expanded *from clearly commercial entities* . . . to membership organizations such as the Boy Scouts." *Id.* (emphasis added).

In sum, neither *Hurley* nor *Dale* supports Masterpiece's sweeping First Amendment claims. Those cases had nothing to do with a business entity selling goods and services to the general public. And aside from these two narrow rulings, which involved noncommercial entities and did not concern actual places of public accommodation broadly open to all, this Court has consistently upheld content-neutral nondiscrimination provisions against First Amendment challenges. Indeed, this Court has never questioned the constitutionality of applying public accommodations laws, like Colorado's Anti-Discrimination Act, to commercial entities, like Masterpiece Cakeshop. *See Roberts*, 468 U.S. at 625 (treating as obvious the "state interest in assuring equal access . . . to the provision of purely tangible goods and services"); *N.Y. State Club Ass'n*, 487 U.S. at 20 (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law.").

B. Masterpiece Is Not Entitled to an Exemption from Colorado's Prohibition on Discrimination in the Provision of Publicly Available Goods and Services.

Like other public accommodations laws that have long been upheld by this Court and others, Colorado's Anti-Discrimination Act is a generally applicable, content-neutral regulation of commercial conduct. It prohibits all business owners from refusing service to particular customers on the basis of protected characteristics like race, creed, and sexual orientation, no matter why they wish to engage in such discrimination. For that reason, it falls well within the State's ordinary power to regulate commercial conduct and does not unconstitutionally compel speech.

Masterpiece's compelled-speech claim is foreclosed by *FAIR*. Like the Solomon Amendment upheld in that case, Colorado's public accommodations law "neither limits what [businesses] may say nor requires them to say anything." *FAIR*, 547 U.S. at 60. Businesses like Masterpiece Cakeshop "remain free under the statute to express whatever views they may have on" same-sex marriage or homosexuality. *Id.* Rather, the statute simply "affects what [businesses] must *do*—afford equal access to [paying customers]—not what they may or may not *say*." *Id.*

Moreover, any impact on Masterpiece Cakeshop's speech is "attenuated at best," *Roberts*, 468 U.S. at 627. Petitioners insist that Masterpiece Cakeshop cakes "necessarily express ideas about marriage and the couple." Pet'rs Br. 15. But, as in *FAIR*, though petitioners believe that following Colorado's Anti-Discrimination Act might "send[] the message that they see nothing wrong with [same-sex marriage], when they do," *FAIR*, 547 U.S. at 64-65, "[n]othing about [selling cakes] suggests that [petitioners] agree with any speech by [a same-sex couple], and nothing in the [Act] restricts what [petitioners] may say about" homosexuality or same-sex marriage, *id.* at 65. Applying Colorado's antidiscrimination law here does not "affect[] in a significant way the [business]'s ability to advocate public or private viewpoints," *Dale*, 530 U.S. at 648. Indeed, most observers would not understand a cake baker to broadcast any particular message when selling (or refusing to sell) a wedding cake to a couple, let alone views in support of or opposed to homosexuality or same-sex marriage. The mere claim that "conduct is undertaken for expressive purposes cannot make it symbolic speech" worthy of protection. *FAIR*, 547 U.S. at 69. The only way that Masterpiece Cakeshop could express a message opposed to same-

sex marriage would be to accompany its discrimination with speech: for example, by publicly proclaiming that it does not serve certain customers because of the owner's views about same-sex marriage. But "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants [heightened First Amendment] protection." *Id.* at 66.

Under *FAIR*, Colorado's application of its public accommodations law to Masterpiece Cakeshop—a "clearly commercial entity" open to the public—must be upheld "'so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 67 (quoting *Albertini*, 472 U.S. at 689); *see Albertini*, 472 U.S. at 688 ("The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests."). As this Court's precedents make clear, "the validity" of content-neutral regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.* at 689. The First Amendment does not "endow the judiciary with the competence" to second-guess a legislature's decision to prohibit discrimination by commercial businesses. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

Under these principles, Masterpiece is not entitled to an exemption from Colorado's requirement that commercial businesses treat all customers on an equal basis. Colorado's Anti-Discrimination Act serves the government's interest in ensuring equal dignity for all without discrimination: its "focal point" is "the act of

discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572. This Court has long held that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628; *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination."); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); Resp'ts Br. 36-45 (Craig and Mullins); Resp't Br. 55-62 (CCRC). Thus, Colorado's Anti-Discrimination Act "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech . . . than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 629 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)). For that reason, requiring Masterpiece Cake shop to abide by Colorado's content-neutral and generally applicable requirements does not violate the First Amendment.

In short, Masterpiece Cakeshop seeks to turn its discriminatory conduct into speech, asserting that requiring it to bake a cake for a same-sex couple violates its First Amendment rights. That view of the First Amendment has been consistently rejected by this Court.

III. PETITIONERS' THEORY HAS NO LIMITING PRINCIPLE AND, IF ACCEPTED, WOULD INEVITABLY CORRODE NONDISCRIMINATION PROTECTIONS APPLICABLE TO PLACES OF PUBLIC ACCOMMODATION.

Petitioners' view of the First Amendment has no limiting principle and would open the door to a host of new claims by commercial businesses that seek exemptions from content-neutral laws, inevitably undermining all manner of legal protections prohibiting discrimination against members of the public. *First*, because of petitioners' expansive definition of conduct that the government may not regulate through generally applicable and content-neutral regulations, discrimination by all types of wedding vendors and other commercial businesses could be insulated from regulation under public accommodations laws. Permitting a business to refuse to serve an individual whenever it can claim that the business has an "expressive component" "would create a gaping hole in the fabric of those laws," *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 431-32; Resp'ts Br. 45-50 (Craig and Mullins). *Second*, petitioners' theory, if accepted, could allow bakers, other wedding vendors, and other commercial vendors to refuse to serve individuals because of their race, creed, marital status, sex, or other classifications ordinarily protected under Colorado's Anti-Discrimination Act. In other words, accepting petitioners' theory would threaten to distort well-established First Amendment principles, which up until now have allowed states to regulate a commercial entity's discriminatory conduct.

A. Acceptance of Petitioners' Theory Would Encourage Other Commercial Providers of Wedding Services To Discriminate Against Same-Sex Couples.

Under petitioners' theory, all manner of wedding service providers could refuse to serve gay men and lesbians, quickly unraveling public accommodations protections more broadly.

According to petitioners, "*any* wedding cake [Masterpiece] would design for" Craig and Mullins "would express messages about their union that [it] could not in good conscience communicate." Pet'rs Br. 21 (emphasis added). That is because, according to Masterpiece Cakeshop's owner, simply by creating a wedding cake, he is "an important part of the wedding celebration for [a] couple," is "an *active* participant" in their wedding, and is "associated with the event." Pet. App. 280a. It makes no difference what words, colors, or design Craig and Mullins desired on their cake; merely requiring Masterpiece Cakeshop to associate with Craig and Mullins' wedding reception would be enough, in petitioners' view, to impermissibly compel petitioners' expression.

This extraordinary "association" theory of protected conduct under the First Amendment is breathtaking in its scope. Under petitioners' view, any other business that offers goods and services imbued with creative aspects could post a "No Same-Sex Couples Served" sign, shutting their doors to gay men and lesbians simply because of who they are. In this way, their theory would inevitably sweep away innumerable "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," *Romer v. Evans*, 517 U.S. 620, 631 (1996).

For example, under petitioners' theory, a florist could refuse to serve a same-sex couple because the intricate bouquets and centerpieces he creates are artistic expressions, and applying an anti-discrimination law to him could "forc[e] him to design wedding [bouquets] celebrating ideas [of] marriage that conflict with his faith," Pet'rs Br. 32. A caterer too could refuse to cater a lesbian couple's wedding, on the theory that the creation of a multi-course meal is considered by many chefs a type of expression worthy of protection. Likewise, a DJ playing songs during a wedding ceremony's procession or during the couple's first dance could argue that he is engaging in expressive activity and thus should be allowed to discriminate against same-sex couples. Finally, any wedding photographer or videographer could argue the same on the ground that she necessarily creates speech when she documents a wedding event. According to petitioners, all of these businesses should be allowed to discriminate against gay men and lesbians simply because creating *any* type of flowers, food, music, or photography for a same-sex wedding would somehow make these business owners—in petitioners' words—"active participant[s]" in and "associated with" the event, Pet. App. 280a.

Indeed, such claims are already being brought—and they are properly being rejected under existing First Amendment principles. *See Telescope Media Grp. v. Lindsey*, No. 16-4094 (JRT/LIB), 2017 WL 4179899 (D. Minn. Sept. 20, 2017) (rejecting First Amendment claim of videographer who refused to serve same-sex couple); *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (rejecting First Amendment claim of florist who refused to serve same-sex couple); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejecting First Amendment

claim of photographer who refused to serve same-sex couple), *cert. denied*, 134 S. Ct. 1787 (2014).

Moreover, petitioners' theory has no limiting principle, and could easily go well beyond businesses that provide expressive wedding services. Under petitioners' theory of the First Amendment, *any* vendor could claim that association with the wedding of a same-sex couple would broadcast the vendor's support for same-sex marriage, and on that basis claim the right to refuse service. Wedding venues could refuse to serve same-sex couples; after all, the venue is "an important part of the wedding celebration for the couple" and a venue owner would necessarily be "associated with the event," Pet. App. 280a. So too could limousine drivers, rental service-providers, invitation printers, tailors, and wedding planners refuse to serve same-sex couples. In fact, many of these vendors must be present at the event or interact with the couple and guests, and this "associat[ion] with the event," *id.*, is enough, in petitioners' sweeping view, to trigger a First Amendment right to refuse to serve certain classes of customers.[2]

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[2] The United States attempts to distinguish businesses that provide "inherently communicative" wedding services from other businesses that provide venues, limousine services, wait staff, and the like, claiming that most people would not think these other businesses communicate a message in support of their clients' marriage. *See* U.S. Br. 21. But the government offers no reason why that is so. In fact, many wedding vendors—like limousine drivers, wedding planners, and wait staff—would be *more* associated with (and thus seeming to approve of) a wedding celebration than a baker because these other vendors must be present during, and take an active role in, the event. *See, e.g.*, Amicus Br. of Nat. Jewish Comm'n on Law and Pub. Affairs 8 ("If an Orthodox Jewish owner of a limousine service were asked . . . to provide group transportation to a religious ceremony in which participation is prohibited by Torah law, he . . . would be committing a personal sin by complying."). By contrast, wedding guests who

Even the paradigmatic innkeeper—long required under the common law to serve all-comers—could, under petitioners' theory, refuse to serve a same-sex couple who wished to celebrate their honeymoon at his hotel. After all, the act of allowing such a couple to spend a night together in one of his rooms could easily be construed by others as, in petitioners' own words, "communicat[ing] that a wedding has occurred, a marriage has begun, and the couple should be celebrated," Pet. App. 280a. Similarly, any business—from health care provider to house cleaner—could object to any recognition that a "wedding has occurred" and a "marriage has begun" and might refuse to accept, for example, one spouse as the other's health care proxy or as a check co-signer with a newly changed name.

In short, by arguing that the First Amendment allows a baker to refuse service to a same-sex couple not because of any disagreement about the design of his cake but simply because of who the couple is, petitioners could open a hole in public accommodations law the size and scope of which is difficult to define. As gay men and lesbians increasingly choose to exercise their right to marry, petitioners' argument would inevitably put them at risk of being turned away from businesses that provide wedding services to the public despite state protections to the contrary. Such a loophole in public accommodations laws would "disparage [same-sex couples'] choices and diminish their personhood," *Obergefell*, 135 S. Ct. at 2602, by "depriv[ing] [them] of their individual dignity," *Roberts*, 468 U.S. at 625; *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S.

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view a wedding cake or other allegedly artistic product at a wedding typically have no idea which vendor produced the item, let alone the vendor's views about a particular marriage ceremony.

241, 250 (1964) (a "fundamental object" of public accommodations laws is to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (citation and quotation marks omitted)). The First Amendment permits a legislature to insist on a brightline anti-discrimination rule rather than one shot through with exceptions. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430 (noting "government's interest in adhering to a uniform rule").

Rather than address these consequences of their position, petitioners prefer to focus on hypothetical future cases that will *not* be governed by the decision in this case. They argue, for example, that ruling for respondents would require a poet to write an objectionable poem, a floral designer to spell out particular words in an arrangement, or a painter to paint a specific picture. *See* Pet'rs Br. 33. But, as noted earlier, Masterpiece Cakeshop did not refuse to serve Charlie Craig and David Mullins because of the cake design they requested; indeed, they never even had the opportunity to discuss what would appear on the cake.

Had Masterpiece refused service because of a disagreement over the actual cake design, and if state law gave customers a right to sue in such circumstances, that hypothetical case might raise serious First Amendment questions about the extent to which the law may compel the actual content of a baker's artistic expression. "While [petitioners'] arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case." *Ward*, 491 U.S. at 792; *see* Pet'rs Br. 56 ("The Colorado Court of Appeals has established, and the Commission has acknowledged, that cake artists may decline requests for cakes

with 'designs or messages' that they consider objectionable."). Holding that the government may prohibit a wedding vendor from refusing to serve gay men and lesbians solely because of their sexual orientation does not threaten the freedom of florists, painters, poets, or bakers to direct the content of their artistic expression.

In short, if petitioners are correct, courts will inevitably hear challenges from all types of wedding vendors seeking new exemptions from neutral and generally applicable public accommodations laws that have long coexisted with the First Amendment.

B. Petitioners' Theory Would Allow Wedding Vendors and Other Commercial Businesses To Refuse To Serve Couples on the Basis of Their Race, Creed, and Other Protected Classifications.

Petitioners' limitless First Amendment theory could also shield the discriminatory conduct of business owners who refuse to serve other groups of people ordinarily protected under public accommodations laws like Colorado's. Colorado's Anti-Discrimination Act prohibits "any place of business engaged in any sales to the public" from denying service "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(1), (2)(a). In petitioners' view, each of these groups enjoys protection only until a business owner claims that complying with the public accommodations law would violate his right to free expression.

For instance, under petitioners' theory, a baker (or other wedding vendor) who believed that interracial marriage was wrong could argue that the First Amendment allows him to express his opposition to interracial marriage by refusing to serve an interracial

couple, despite Colorado's prohibition on discrimination based on race, color, national origin, or ancestry. *Cf. Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Likewise, a wedding vendor who believed that interfaith marriage was wrong could refuse to participate in a wedding between a Jew and a non-Jew, despite Colorado's prohibition on discrimination based on creed. So too could a baker (or other wedding vendor) refuse to serve divorcées who sought to remarry if the baker believed that such marriages are wrong, even though Colorado prohibits discrimination based on marital status.

Moreover, the consequences that might follow from accepting petitioners' theory are not limited to weddings. *See* Resp'ts Br. 47 (Craig and Mullins). A baker could refuse to create a cake celebrating a female CEO's retirement—violating Colorado's prohibition on sex discrimination—if he believed all women have a duty to stay home and raise children. Similarly, a furniture-maker—who considers his furniture pieces to be artistically expressive—could refuse to serve an interracial couple if he believed that interracial couples should not share a home together. Petitioners fail to explain why their First Amendment theory would not extend as well to commercial establishments providing non-wedding services to the public.

The United States makes no attempt to distinguish discrimination on the basis of creed, marital status, or sex from sexual-orientation discrimination; under its view, those protections could fall next. However, the United States does seek to distinguish prohi-

bitions on racial discrimination, apparently on the theory that "'racial bias' is 'a familiar and recurring evil' that poses 'unique historical, constitutional, and institutional concerns.'" U.S. Br. 32 (quoting *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017)).

Our Constitution, however, grants "equal dignity in the eyes of the law" to all persons, including gay and lesbian citizens, *Obergefell*, 135 S. Ct. at 2608, and prohibits discrimination that "serves to disrespect and subordinate them," *id.* at 2604; *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (holding that equal protection guarantee "withdraws from Government the power to degrade or demean"). As this Court has explained, laws prohibiting discrimination by places of public accommodation "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250 (citation and quotation marks omitted). "That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their [sexual orientation] as by those treated differently because of their race." *Roberts*, 468 U.S. at 625. Indeed, in *Christian Legal Society*, this Court upheld a university's effort to prevent student groups from discriminating against students based on their sexual orientation, refusing "to distinguish between status and conduct in this context." 561 U.S. at 689. The Constitution permits States to help realize the guarantee of equal protection of the laws, including by prohibiting discrimination on the basis of sexual orientation by commercial businesses.

The United States also notes that unlike racial classifications, this Court has not held that "classifications based on sexual orientation are subject to strict scrutiny." U.S. Br. 32. While true, the United States

fails to explain why this distinction is relevant. States and municipalities have long "set forth an extensive catalog of traits which cannot be the basis for discrimination," and have not limited themselves "to groups that have so far been given the protection of heightened equal protection scrutiny under [the Court's] cases." *Romer*, 517 U.S. at 629. Whether this Court directs a higher level of scrutiny toward certain trait-based classifications under the Equal Protection Clause should not affect whether a State may prohibit discrimination based on other traits.

In short, petitioners in this case proclaim that Colorado "violates First Amendment freedoms." Pet'rs Br. 2. But, just like litigants of the past, they "attempt[] to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 547 U.S. at 70. Stretching their theory to its logical conclusion, petitioners would have this Court create loopholes in public accommodations laws through which all manner of discrimination by all sorts of businesses could attempt to pass. Rather than go down that path, this Court should hold that Masterpiece Cakeshop, like other commercial businesses providing goods and services to the public, must comply with Colorado's Anti-Discrimination Act.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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October 30, 2017

APPENDIX

APPENDIX

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